IN THE

Supreme Court of the United States

Term, 1940.

No. 350.

ALBERT [illegible] LIEBERMAN, EMIL COHN, JR., and GEORGE F. McCANN, Ancillary Receivers of CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a Corporation,

Petitioners,

against

CITY OF PHILADELPHIA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit, and Supporting Brief.

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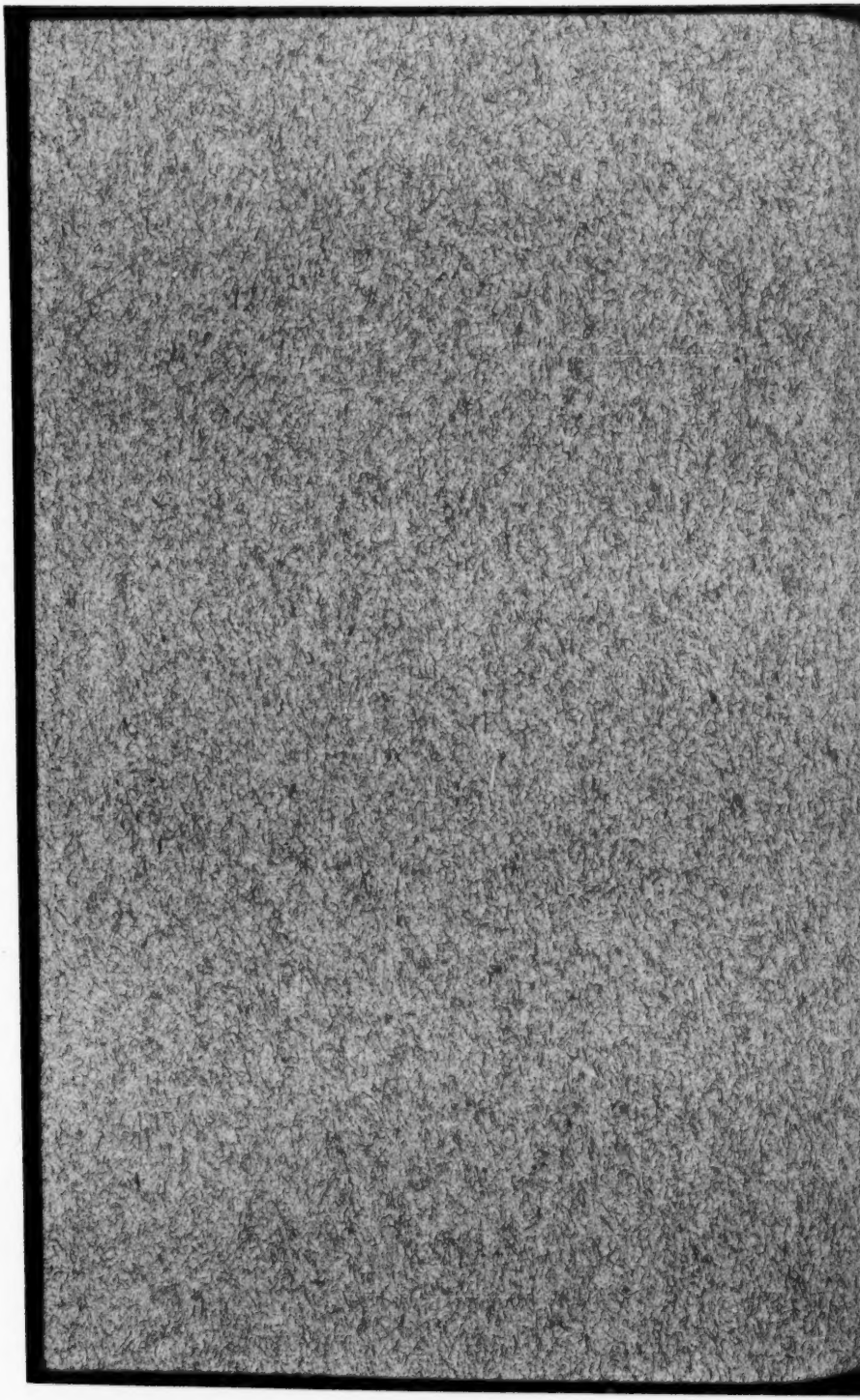

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ALBERT H. LIEBERMAN, EMIL COHN, JR., AND GEORGE F. McCANN, ANCILLARY RECEIVERS OF CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, A CORPORATION,

Petitioners,

against

CITY OF PHILADELPHIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners above named pray that a writ of certiorari issue to review the judgment (R. pp. 244 and 282), of the Circuit Court of Appeals for the Third Circuit entered in the above entitled matter on May 22, 1940 reversing the judgment (R. pp. 233, 237) of the District Court for the Eastern District of Pennsylvania dated May 15, 1938 directing Broad Street Trust Company to turn over to Petitioners certain City of Philadelphia bonds in the face amount of $100,000.

OPINIONS BELOW.

There was no opinion of the District Court accompanying its decree dated May 15, 1938. The opinions of the Circuit Court dated February 8, 1940 and May 22, 1940 are printed in the Record respectively p. 237 and p. 279. They are also reported in 112 F. (2d) p. 424.

JURISDICTION.

The final decision of the Circuit Court of Appeals for the Third Circuit was rendered May 22, 1940.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 938. This section, as limited by the Act of February 13, 1925, Chap. 229, Sec. 8, provides for review by certiorari within three months after the entry of a final judgment of a circuit court.

SPECIFICATIONS OF ERROR UNDER RULE NO. 38.

A conflict exists between the decision of the Circuit Court for the Third Circuit and a decision of this Court and one by another circuit court. The Circuit Court has also probably come to an untenable conclusion on an important proposition of general law.

SUMMARY STATEMENT OF MATTER INVOLVED.

This case involves the respective rights of the parties in City of Philadelphia bonds in the face amount of $100,000 deposited with Broad Street Trust Company of Philadelphia under a certain agreement executed November 30, 1929 [1] by and between Consolidated Indemnity and Insurance Company, a corporation engaged in the business of

[1] R. pp. 11-15.

insurance and indemnity (hereinafter for brevity referred to as "Consolidated") and Broad Street Trust Company.

The deposit was made pursuant to an ordinance of the City of Philadelphia (hereinafter for brevity sometimes referred to as "the City") dated July 4, 1887,[2] under which, in order to qualify on contracts with the City of Philadelphia, foreign insurance or indemnity companies are required to deposit securities approved by the City Solicitor in the face amount of $100,000. The terms of this agreement giving rise to the present dispute are those providing

(a) that the bonds could be sold and their avails devoted only to the payment of any **unsatisfied judgment** in favor of the City of Philadelphia against any contractor with the City whose obligations were assured by Consolidated; and

(b) that the bonds were not to be returned to Consolidated while there were any "outstanding obligations" of Consolidated to the City.

On May 24, 1934, upon the termination of certain proceedings instituted by the Superintendent of Insurance of the State of New York in the matter of the application of

> THE PEOPLE OF THE STATE OF NEW YORK BY GEORGE S. VAN SCHAICK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, FOR AN ORDER TO TAKE POSSESSION AND LIQUIDATE THE BUSINESS AND AFFAIRS OF CONSOLIDATED INDEMNITY AND INSURANCE COMPANY

Part I of the Supreme Court of the State of New York, entered a judgment, inter alia, granting the application of the Superintendent of Insurance described in the caption of the case, also dissolving the corporation and revoking its

[2] R. pp. 9-11.

charter. This is referred to briefly and in summary form in Paragraph 1 of the Report of the Special Master (R. p. 196).[3] The entire decree is submitted as an Appendix hereto, p. 21.

There is no contention by any party to the record that the judgment mentioned in the preceding paragraph has ever been appealed from, or that it is not a final judgment of a court of competent jurisdiction at the place of the domicile of the defendant corporation. Paragraph 1 of the Report of the Special Master just above mentioned was not the subject of any exception by Respondent.

On May 11, 1934, during the pendency of the proceedings in the Supreme Court of New York above described, the District Court for the Eastern District of Pennsylvania entered a decree appointing Petitioners ancillary receivers of Consolidated in and for the Eastern District of Pennsylvania, in which decree all persons whatsoever were ordered to surrender to Petitioners as such receivers all property of any kind belonging or owing to Consolidated, and were further enjoined from "prosecuting, executing or suing out of any court any process, attachment, replevin or other writ for the purpose of taking possession, impounding or interfering with the assets or effects of" Consolidated. The facts just recited in this paragraph were summarized by the Special Master in Paragraph 2 of his Report, (R. p. 196).[4] The entire decree is submitted as an Appendix hereto, p. 26.

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[3] A copy of this decree was offered in evidence, (being Exhibit No. 4, in the hearing before the Special Master on November 26, 1937 (R. p. 59)), but was not included by Respondent in the printed record submitted herewith.

[4] A copy of this decree was offered in evidence at the meeting before the Special Master on November 26, 1937 (R. p. 59), but was not printed by Respondent in the Record submitted herewith.

With leave of the District Court, Petitioners instituted proceedings in equity before that tribunal against Respondent and Broad Street Trust Company (which last defendant by answer has thrown itself on the mercy of the Court). The Bill recited the foregoing facts, prayed an accounting, and the surrender to Petitioners by the defendants in the action of all securities in the hands of Broad Street Trust Co., in excess of proper claims against them. Respondent's answer alleged the existence of "outstanding obligations" of Consolidated to the City but not of any unsatisfied judgments in Respondent's favor against Consolidated.

Two essential questions were presented for disposition in the proceedings:

(a) Is it possible for Respondent to obtain a judgment against Consolidated?

(b) Are there any outstanding obligations of Consolidated to Respondent?

If the answer to the first question is negative, there could be no question but that the securities would have to be delivered to the custody of the court's officers for disposition by it under the terms of the agreement. The second question would appear to be subordinate.

The matter was referred by the Court to Howard Benton Lewis, Esquire, Special Master. Before him the following additional facts were elicited in evidence:

At the time of its collapse Consolidated was surety upon the contracts of several contractors building for Respondent various public works, including subways, streets and public buildings. Each such contract contained an indemnity clause by which *the contractor* agreed to indemnify Respondent against claims by third parties. A stand-

ard instance of such clause appears in the Golder Contract:[5]

> "It is understood and agreed that the party of the second part shall be considered an independent contractor in respect of the work covered by this agreement and that the party of the second part shall alone be answerable for any loss or damage caused by the party of the second part or by the servants, agents or employees of the party of the second part; and the party of the second part agrees to fully indemnify, protect and save harmless the party of the first part from all loss, damage or expense from claims and liability resulting from accident, negligence or other cause during the prosecution of the work covered by this contract. The party of the second part further contracts and agrees to be responsible for and pay all loss or damage to either person or property which may, in any manner, arise by reason of the prosecution of the work covered by this contract during the progress of the same, and, in the case of the happening of such loss or damage, the amount thereof may be retained by the party of the first part out of any payments due or to grow due to the party of the second part under this or any other contract."

The ordinary Statute of Limitations for suits for personal injuries in Pennsylvania is two years, for injuries to property, six years. There is a special act, that of July 1, 1937,[6] providing that in the case of municipalities, unless a court for reasonable "excuse" shown shall decree a waiver of the terms of the statute, no suit shall be brought against a municipality unless written notice be given within six months of the date of origin of such claim or within the same period of the date of the negligence complained of.

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[5] R. pp. 73-74.

[6] P. L. 2547, 53 Purdon's Statutes 2774, a copy of which is appended at the foot hereof in the Appendix, p. 29.

There is no dispute that more than six years have now expired since the completion of all contracts but three wherein Consolidated was surety, the latest of which was completed April 15, 1937.[7] Respondent has received no notice, written or otherwise, nor has it any knowledge of any claim arising out of these three contracts.[8] It is unwilling to surrender the security deposited with the Broad Street Trust Company under the November 29, 1930 agreement until six years have elapsed since the completion of the last contract, or until April 15, 1943, maintaining that until that date there is an "outstanding obligation" by Consolidated. No other types of obligation are involved.[9]

The Special Master filed a report in which he found that there had never been nor were there any unsatisfied judgments against Consolidated in Respondent's favor,

[7] R. p. 165.

[8] R. pp. 111, 113, 121, 138, 170.

[9] (A) In the Special Master's Report reference is made (R. p. 199) to two suits then pending arising out of contracts upon which Consolidated was surety. The record does not disclose the fact but there is no dispute that one of these two suits was discontinued October 21, 1938 and the other non-prossed by Respondent itself January 29, 1940.

(B) Mention was made in one of Respondent's exceptions to the Special Master's Report (R. p. 224) to a contract involving an alleged 15 year guarantee of a station house roof. Reference to the contract (R. pp. 117-120) shows that this provided a guarantee by the manufacturer of the roofing material. As the contract was paid for, the manufacturer's guarantee was evidently furnished.

(C) At the time of the filing of the Master's report, $1839.11 *was* owed Respondent under contracts involving highway maintenance guarantees (R. p. 199). Under order of court, this $1839.11 plus an additional $230.49 has been paid by Petitioners to Respondent.

and that there were no outstanding obligations of Consolidated to Respondent. He concluded that as no judgment by Respondent against Consolidated could hereafter be obtained, the securities ought to be delivered by Broad Street Trust Company to Petitioners as the Court's officers for such disposition as the District Court might direct.[10]

Exceptions by Respondent to the report of the Special Master were dismissed by the District Court in decree signed by Welsh, J. dated May 15, 1938.[11] No opinion was filed, but from the language of the decree it would appear that the Court intended to make no disposition of the secondary question—whether there were any outstanding obligations. The defendants in the action were directed to surrender to Petitioners $100,000 worth of bonds, such securities 'hereafter to be held by Petitioners in their capacity as Receivers separately, Petitioners not to sell the same nor to use the same in any manner whatever except in respect to the collection of coupons for interest thereon and therefrom without further order of the Court.'

Respondent appealed to the United States Circuit Court for the Third Circuit. On February 8, 1940 that Court (Maris, Clark and Jones, JJ, sitting) handed down a decree reversing the decree of the District Court and remanding the cause to the District Court with instructions to dismiss the Bill.[12]

The Circuit Court concluded the first question by deciding that a judgment against Consolidated was not legally impossible. On the second question it decided that there were outstanding obligations of Consolidated to Respond-

[10] R. pp. 196-201.
[11] R. pp. 233-234.
[12] R. p. 244.

ent and this because the indemnity provisions in the contracts such as that quoted on p. 6 hereof, made the contractors liable to Respondent *perpetually;* the contractors' duty to indemnify might arise at *any* time in the future when someone might claim to be injured as a result of "accident, negligence or other cause during the prosecution of the work".

A petition for reargument was granted and at the same time a petition was filed by George deB. Keim and Thomas C. Egan, Ancillary Receivers of International Re-Insurance Corporation by their attorneys, J. Hector McNeal, Franklin E. Barr and J. Wesley McWilliams, for leave to appear and argue as amici curiæ. Such leave was granted. On May 22, 1940, after argument by both the original parties and the amici curiæ, the Circuit Court, with the same judges sitting, affirmed with some modification its former decree. It reaffirmed the conclusions above recited, but held that in view of the "usage" of the City—of which there was no evidence whatever in the Record other than the contentions of Respondent—the securities should not be held for more than six years after the completion of the last contract.[13]

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. Under the terms of the agreement under which the bonds were deposited, they may never be used except to defray unsatisfied judgments in favor of Respondent against Consolidated.[14]

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[13] R. p. 279. Because the contract as to which International Re-Insurance Corporation was surety had at that time been completed more than six years, the amici curiæ have no further interest in these proceedings.

[14] R. p. 14.

2. If such a judgment is legally impossible, the pledged property should be surrendered by Broad Street Trust Company to Petitioners, subject to the agreement, for the action of the District Court in the premises.[15]

3. In holding that a personal judgment is now possible in favor of Respondent against Consolidated, the Circuit Court has departed from a proposition of general law well established by this Court in **Clark v. Williard, 292 U. S. 112, 78 L. Ed. 1160, 54 Sup. Ct. Rep. 615 (1934)**, that when a foreign corporation has been dissolved, no suit can be brought against it and no personal judgment against it can be obtained in the absence of a statute or a public policy to the contrary in the state where the foreign corporation has been licensed to do business.[16]

4. In holding that a personal judgment may still be obtained outside its domicile against a dissolved New York insurance company, the Circuit Court has acted in diametric opposition to the decision of the Fifth Circuit Court in **National Surety Co. of N. Y. v. Cobb, 66 F. (2d) 323, (CCA 5, 1933)**, wherein it was directly ruled to the contrary —that a judgment can **not** be obtained in another state against a New York insurance company, previously dissolved in New York, because by the law of New York [17] such an insurance company when dissolved is *civiliter mortuus*, and no action can be maintained against it anywhere.

5. That there is no public policy applicable in Pennsylvania contrary to the propositions mentioned in paragraphs numbered 3 and 4 is abundantly manifest in **Burns v.**

[15] See cases cited in accompanying brief, p. 13 hereof.

[16] See also United States v. Federal Surety Co., 72 F. (2d) 961, (CCA 4, 1934). U. S. Truck Co. v. Penna. Surety Co., 259 Mich. 422, 243 N. W. 311 (1931).

[17] 27 McKinney's Consolidated Laws, Sec. 404.

Niagara Life Insurance Company, 279 Pa. 453, 124 A. 128 (1924).

6. The Circuit Court has given a clause which is customary and in general use in building contracts the character of a contract for perpetual maintenance and insurance **after completion.** No authorities can be found in the law of building contracts directly supporting this view, so that the Circuit Court has decided an important question of general law in a way probably untenable.[18]

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Third Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court, and your Petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

DAVID GOFF,
GEORGE V. STRONG,
HIRSCHWALD, GOFF & RUBIN,
STRONG, SAYLOR & FERGUSON,
Counsel for Petitioners.

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[18] See argument pp. 16-19 hereof.

BRIEF IN SUPPORT OF PETITION.

1. In cases of insolvency where property is pledged for a particular purpose and the pledgeholder has not the means, power or machinery for carrying out the terms or purposes of the pledge, the pledged property must be turned over to the Receiver as the Court's officer subject, nevertheless, to the terms of the pledge.

Hobbs v. Occidental Life Insurance Co., 87 F. (2d) 380 (CCA 10, 1937);

Huffines v. American Security & Trust Co., (Court of Appeals, D. of C.) 71 F. (2d) 345 (1934);

Holloway v. Federal Reserve Life Ins. Co., 21 F. Supp. 516 (D. C. W. D. Missouri 1937);

Morrill v. American Reserve Bond Co., 151 F. 305 (C. C. W. D. Missouri, 1907);

Hankins v. Sallard, 188 So. 411 (La. 1939);

Petition of State, 182 S. Carolina 369, 189 S. E. 475 (1937);

Aetna Casualty & Surety Co. v. International Re-Insurance Corporation, 117 N. J. Eq. 190, 175 A. 114 (1934);

Cogliano v. Ferguson, 245 Mass. 364, 139 N. E. 527 (1923);

Phillips v. Perue, 111 Tex. 112, 229 S. W. 849 (1921); [19]

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[19] Semble:
Hopkins v. Lancaster, 254 F. 190, 192 (D. C. N. D. Ala., 1918).
Relfe v. Spear, 6 Mo. App. 129 (1878).
Sangamon Loan & Trust Co. v. Peoples Saving Bank & Trust Co., 204 Ill. App. 7 (1917).
Van Gilder v. Parker, 69 Col. 196, 193 P. 664 (1920).

Examination will show that the cases cited by the Circuit Court to the contrary [20] are all cases where the pledgeholder had the power and machinery for carrying out the terms of the pledge.

2. The conflict between the decision of the Circuit Court for the Third Circuit and that of the Circuit Court for the Fifth Circuit in the case of **National Surety Co. of N. Y. v. Cobb, 66 F. (2d) 323, (CCA 5, 1933)** is inescapable.

In the February 8, 1940 opinion of the Circuit Court, although the **National Surety Company** case had been cited in Petitioners' brief, no direct mention of this case was made by the Court.[21] Instead, the Court cited Section 29 of the General Corporation Law of New York, as amended by the Laws of 1932 c. 552 (22 N. Y. Consol. Laws (McKinney), Pocket Supp.), where it is provided that "Upon the dissolution of a corporation for any cause and whether voluntary or involuntary its corporate existence shall continue for the purpose of paying, satisfying and discharging any existing liabilities or obligations * * * and it may sue and be sued in its corporate name". The **National Surety Co.** case was not mentioned at all in the Court's opinion on reargument.[22]

The Court also cites *Bloedorn v. Washington Times,* 89 F. (2d) 835 (CCA D. C. 1937) for the proposition that it is still possible to sue a New York corporation outside of New York despite dissolution at the domicile. But the *Bloedorn* case did not involve an insurance company, and in the **National Surety Company** case it was expressly and definitely decided that Section 29 of the General Corpora-

[20] R. p. 240.
[21] R. pp. 237-244.
[22] R. pp. 279-282.

tion Law of New York did not apply to the case of an insurance company. The Circuit Court for the Fifth Circuit in the **National Surety Company** case considered not only Section 29 of the General Corporation Act (cited by the Third Circuit Court herein, R. p. 243 and just recited above), but also Section 6 thereof which provides that no section of the General Corporation Act shall apply where in conflict with "any other corporate law". The Fifth Circuit Court in the **National Surety Company** case decided that Section 29 did not apply in the case of an insolvent insurance company because that section in such case was in conflict with Section 63 of the Insurance Code. (Subsequent amendments of both acts have not removed Section 6 or the inconsistency between the two codes).

In the petition it has already been set forth (pp. 10, 11) that the law of Pennsylvania under **Burns v. Niagara Life Insurance Company, 279 Pa. 453, 124 A. 128 (1924)**, is similar to the law of New York as laid down in the **National Surety Company** case, for which reason there does not exist a "public policy" opposing the general proposition as set forth by this Court in **Clark v. Williard, 292 U. S. 112, 78 L. Ed. 1160, 54 Sup. Ct. Rep. 615 (1934)**.

3. In declaring in its opinion [23] that upon proper application by the City (as one having a paramount right) the District Court could grant Respondent leave to sue in the appropriate tribunal and thus Respondent could obtain a judgment against Consolidated, citing *Meehan v. Connell Anthracite Mining Co.*, 318 Pa. 481, 178 A. 833 (1935), the Circuit Court asserts a conclusion which does not meet the insufficiency of the District Court's power to permit a suit against a defunct New York insurance company, which,

[23] R. pp. 243, 244.

under the laws of its domicile, as construed by both the Pennsylvania and Federal Courts, cannot be sued anywhere.

4. In deciding that there are now outstanding obligations of Consolidated, the Court below has introduced a startling innovation into the law of building contracts and commercial surety, one not directly supported by any previous authority, and this for the following reasons briefly summarized:

(a) Contracts such as the Golder contract [24] are not insurance contracts, as the Circuit Court in both opinions makes them, but building contracts. They must be capable of performance. This would seem to have occurred when the work covered by a contract is completed, accepted and paid for. The nature of the contract speaks loudly against any conclusion that a provision for permanent insurance was intended to be embraced.

(b) In rejecting any such reasonable interpretation of the type of contract involved, the Circuit Court parses the indemnity provision [25] as three *separate* engagements—to be answerable, to save harmless, and to pay. Despite the sense, and relying only on the punctuation of this age-old clause, the Court refuses to apply to the clause as an entirety the restrictive language attached to the third and concluding phrase thereof—that the losses or damages to be paid for by the contractor are only those **arising during the progress of the work.** The Circuit Court concludes that this restriction can be disregarded when determining that the contractor intended by all the language used to indemnify the Respondent for

[24] R. pp. 73-74. See p. 6 hereof.
[25] R. p. 280. See also p. 6 hereof.

eternity in respect to any claim arising in the indefinite future which could be traced to any happening before completion.

(c) If the Circuit Court's original conclusion is correct, no logical reason can exist for limiting the period of indemnity to six years. Such a conclusion, appearing in the opinion on reargument,[26] is helpful to Petitioners, but does not conform to logic or the record, wherein there is no evidence of *general* usage or custom whatever. It must not be forgotten that Respondent wrote the contract. It should be construed strictly against it. Also, the law abhors perpetuities. Certainly a strict construction against the other party should not be given to an ordinary clause in a building contract establishing a perpetuity where no American case could be found by the Court or the parties establishing such a novel proposition, and the only English case on similar facts is opposed.[27]

(d) The lower Court's determination that the contractor is permanently obligated to Respondent after completion (as one whose obligation is still not performed) is most unreasonable in the light of one of the ordinances referred to in the Golder contract. On R. pp. 75 and 76 it is recited that that contract is entered into subject to the provisions of various Acts of Assembly and Ordinances. The only one of these helpful to this Court's decision on the merits is the Ordinance of April 12, 1909 (Ordinances of 1909, p. 87). This provides for the deposit with the City Treasurer of cash, government or municipal bonds by contractors in lieu of corporate security. Section 4 of this

[26] R. pp. 281, 282.

[27] Ilford Gas Co. v. Ilford Urban District Council and Jackson, 3rd party, LXVII, The Justice of the Peace, p. 365 (Court of Appeals, 1903).

Ordinance permits the return of the cash or securities by the City Treasurer to the contractor "upon the expiration of the time for which the contractor is liable for the proper fulfillment" of his contract. Had Mandes Golder deposited $4,800,000 worth of Liberty Bonds in lieu of entering corporate security, it is not believed that any court would have construed his contract to mean that the "time of fulfillment" would never come. Certainly, a surety should have the same right as the contractor himself for the return of pledged collateral if, at the time of acceptance of his work and payment for the same, Respondent has no claim upon such collateral. Under the original decree of the Circuit Court there is no "time of fulfillment", as the contractor was declared to be bound forever to indemnify Respondent against future happenings. Under the second decree, the contractor might recover his property in six years, but there would still be no "time of fulfillment".

(e) The cases are clear that clauses like that here involved are not to be construed to place upon the contractor responsibility for the municipality's own negligence;[28] also, that after acceptance by a municipality of work done under a contract, the municipality alone is liable to third parties for accidents thereafter suffered by third parties, and this because the municipality accepted the work and had the duty of maintenance afterwards.[29] Latent defects

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[28] Flynn v. Philadelphia, 199 Pa. 476 (1901).
Morton v. Traction Co., 20 Pa. Super. Ct. 325 (1902).
Perry v. Payne, 217 Pa. 252 (1907).
Central Surety & Ins. Co. v. Hinton, 130 S. W. (2) 235 (Mo. 1939).
Wait: Engineering and Architectural Jurisprudence, Sec. 638.

[29] Boswell v. Laird, 8 Calif. 469 (1857).
Vogel v. The Mayor, etc. of New York, 92 N. Y. 10 (1883).

would give third parties no ground for action against Respondent. These propositions deprive the *Pollock* [30] case (cited by the Circuit Court (R. p. 242)) of any aptness to the facts at bar.

5. For any jeopardy Respondent might have as a result of accidents occurring *during* construction, the Act of 1937 [31] would seem to afford Respondent adequate protection.

It is therefore respectfully submitted that this petition should be allowed.

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Counsel for Petitioners.

First Presbyterian Congregation v. Smith, 163 Pa. 561 (1894).
Penna. R. R. Co. v. Roydhouse, 267 Pa. 368, 110 A. 277 (1920).
Khron v. Brock, 11 N. E. 748 (Mass. 1887).
Boston Excelsior Co. v. Continental Asphalt Paving Co., 114 N. Y. S. 825 (1909).
Memphis Asphalt & Paving Co. v. Fleming, 96 Ark. 442, 132 S. W. 222 (1910).
City of Richmond v. Jackson, 118 Va. 674, 88 S. E. 49 (1915).
Cunningham v. Gillespie Co., 241 Mass, 280, 135 N. E. 105 (1922).
Ford v. Sturgis, 14 F. (2d) 253 (CCA D. C. 1926).
Wait on Engineering and Architectural Jurisprudence, Sec. 643.

[30] Pollock v. Pittsburgh, Bessemer & Lake Erie R. R. Co., 275 Pa. 467, 119 A. 547 (1923). The case of Rudman et ux v. City of Scranton, 114 Pa. Super. Ct. 148, 173 A. 892 (1934) does not relate to a building contract and in deciding the case the Court has omitted completely an essential part of the contract.

[31] See appendix hereto, p. 29.

APPENDIX.

1. Decree of Dissolution of Consolidated Indemnity and Insurance Company:

At a Special Term of the Supreme Court of the State of New York, Part I thereof, held in and for the County of New York, in the Borough of Manhattan, City, County and State of New York, First Judicial District, on the 29th day of May, 1934.

Present:

HON. ERNEST E. L. HAMMER, *Justice.*

In the Matter
of the
Application of the People of the State of New York, by George S. Van Schaick, as Superintendent of Insurance of the State of New York, for an order to take possession of the property and liquidate the business and affairs of the
Consolidated Indemnity and Insurance Company.

Upon reading and filing the order to show cause dated the 24th day of May, 1934, and duly granted by Mr. Justice J. F. Carew, one of the Justices of the Supreme Court of the State of New York, in the First Judicial District; the petition of George S. Van Schaick, Superintedent of Insurance of the State of New York, duly verified on the 24th day of May, 1934, and the exhibits thereto attached, (Ex-

hibits A, B and C); the affidavit of John E. Watson, duly sworn to on the 24th day of May, 1934; the affidavit of service of said order to show cause and of the papers upon which it was granted, duly sworn to by Charles S. Beller, on the 25th day of May, 1934; the affidavit of William P. Habel, duly sworn to on May 28th, 1934; and upon the order of rehabilitation dated the 10th day of May, 1934, heretofore granted against the Consolidated Indemnity and Insurance Company; and it appearing that all further efforts to rehabilitate the Consolidated Indemnity and Insurance Company; and the motion to liquidate having been duly brought before this Court by the order to show cause aforesaid; after hearing John J. Bennett, Jr., Attorney General of the State of New York (Joseph C. H. Flynn of Counsel) representing the Superintendent of Insurance of the State of New York in support of said motion and there being no opposition; after due deliberation, upon filing the opinion of the Court, it is hereby

ORDERED, that the petition of George S. Van Schaick, Superintendent of Insurance of the State of New York, be and the same hereby is in all respects granted; that the said Superintendent, or his successor in office, is hereby directed forthwith to take possession of the property and to liquidate the business of the Consolidated Indemnity and Insurance Company, pursuant to Article XI of the Insurance Law of the State of New York; that the said Superintendent is hereby vested with full title to all property of said company; and that he, or his successor, is hereby directed to deal with the property and business of the said company in his own name as Superintendent of Insurance; and it is further

ORDERED, that the said Consolidated Indemnity and Insurance Company is insolvent; and it is further

ORDERED, that the Superintendent of Insurance as Liquidator of the Consolidated Indemnity and Insurance Company promulgate the making and entry of this order by a liquidation notice:

(1) demanding that persons indebted to said company pay their indebtedness to the Liquidator;

(2) directing persons having property or records of the Consolidated Indemnity and Insurance Company to assign, transfer and deliver them to the Liquidator, and to submit all books or records relating to the Consolidated Indemnity and Insurance Company to the Liquidator or to his agents for examination and copying at all reasonable times;

(3) instructing persons who have claims against the Consolidated Indemnity and Insurance Company to present same by sworn proofs of claims to the Superintendent of Insurance as Liquidator or to his special Deputy at a place specified in said Liquidation notice within six (6) months from the date of entry of this order and not later than December 1st, 1934; and it is further

ORDERED, that such liquidation notice be published in the New York Law Journal commencing on the 8th day of June, 1934, and thereafter twice a week for three successive weeks, and by mailing within sixty (60) days after the entry of this order a copy of such notice addressed to the known persons who have claims against the Consolidated Indemnity and Insurance Company at such addresses

as may be disclosed by the available home office records of the company, but that the Liquidator shall not be required to mail such notice to those who may have a claim arising under bonds, policies or other obligations of the Consolidated Indemnity and Insurance Company which were marked closed on the books and records of said company on the date of the entrv of the order of liquidation herein, nor shall the Liquidator be required to send notice by mail to employees insured under fidelity bonds where the employer pays the premium and such employees have no interest in or claim thereon; and it is further

ORDERED, that such liquidation notice contains the mandate of this Court and is sufficient notice to all persons interested in the Consolidated Indemnity and Insurance Company and that claims presented may be determined and assets distributed without further notice to persons failing to comply with said liquidation notice; and it is further

ORDERED, that all persons are hereby enjoined and restrained from

(1) transacting any business of the Consolidated Indemnity and Insurance Company;

(2) dealing with the property or records of said company;

(3) **obtaining or allowing the obtaining of, preferences, judgments, forfeitures, penalties, fines, attachments or other liens or levies against the estate of said company under the control of the Liquidator;**

(4) **bringing or further prosecuting any action, suit, special or other proceeding against the said company or its estate or against the Liquidator thereof;**

(5) interfering in any way with the Liquidator in his title, possession, or management of the property of said company; and it is further

ORDERED, that in order to give additional notice to any persons who may have claims against the said Consolidated Indemnity and Insurance Company arising out of the active obligations, but whose names are unknown or whose addresses are so defective that letters transmitted by mail would probably not reach them, and in lieu of mailing notice to those interested in the bonds, policies or other obligations of the Consolidated Indemnity and Insurance Company which were marked closed on the books and records of the said company on the date of the entry of the order of liquidation, further notice be given by publication in the following cities where the Consolidated Indemnity and Insurance Company had branch offices or important agencies by publication of such notice in one newspaper in each of said cities once a week for three successive weeks beginning the 15th day of June, 1934, such newspapers to be selected by the Superintendent of Insurance in his discretion:

Washington, D. C.	Albany, N. Y.
Chicago, Ill.	Buffalo, N. Y.
Baltimore, Md.	Rochester, N. Y.
St. Paul, Minn.	Syracuse, N. Y.
Kansas City, Mo.	Cleveland, Ohio
Bayonne, N. J.	Columbus, Ohio
Jersey City, N. J.	Philadelphia, Pa.
Newark, N. J.	Pittsburgh, Pa.
Trenton, N. J.	Norfolk, Va.
	Richmond, Va.

and it is further

ORDERED, that the corporate charter of the Consolidated Indemnity and Insurance Company is hereby annulled and the said corporation dissolved.

Enter,

E. E. L. H.,
J. S. C.

---

2. Order Appointing Ancillary Receivers.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Bethel Perkins v. *Consolidated Indemnity & Insurance Company, a corporation of the State of New York.*	IN EQUITY. March Term, 1934. No. 8167.

AND NOW, to wit, this 11th day of May, A. D., 1934, the said matter having come on for hearing, and it appearing that on the 8th day of May, 1934, Albert H. Lieberman and Emil Cohn, Jr., were, by order of this Court, appointed Temporary Receivers of the aforesaid defendant company, and it further appearing, since the filing of the said Bill in this Court that by order of the Supreme Court of the State of New York, acting by Mr. Justice Alfred Frankenthaler, the said defendant insurance company and its assets, business and property have been taken over by the Superintendent of Insurance of the State of New York as statutory liquidator under and by virtue of the laws of the State of New York, on motion of David Rosen, Esq., leave is hereby

granted to amend the original Bill filed in this cause so that the relief prayed for therein is for the appointment of Ancillary Receivers in this jurisdiction, and it is

ORDERED AND DECREED that Albert H. Lieberman, Emil Cohn, Jr., and George F. McCann, be and they are hereby appointed Ancillary Receivers of all assets of every description belonging to Consolidated Indemnity & Insurance Company, a corporation located within this jurisdiction, to hold and preserve all of said assets, real, personal and mixed, of whatsoever kind and description, including any cash on hand and belonging to the said Consolidated Indemnity & Insurance Company; and it is

FURTHER ORDERED AND DECREED that the said Ancillary Receivers be and they are hereby authorized and empowered **to take into their possession all of the property, assets, effects and businesses of the said defendant, which they may find in this District**, including any and all assets and businesses carried on, in, by or through the said Consolidated Indemnity & Insurance Company, and its subordinate and affiliated companies, and to continue the carrying on and conduct of this business until the further order of this Court, keeping full and faithful order and account of all of the properties coming into their hands, as well as all moneys received and disbursed, and such Ancillary Receivers are hereby further empowered and authorized to employ such agents, servants and employes as in their judgment they shall deem necessary in the conduct of said business, and to operate said business and properties; and it is

FURTHER ORDERED that the said defendants, agents, servants and employes forthwith deliver to said Ancillary

Receivers all of its properties, assets and effects now in its possession or under its control, including any and all assets or businesses held by or in the name of the said Consolidated Indemnity & Insurance Company, whether by it or its subordinate or affiliate companies or agencies, and that the said Consolidated Indemnity & Insurance Company, its officers, directors, agents, servants, employes and all other persons, firms, corporations and creditors, as well as their and each of their attorneys, agents, servants and employes and all sheriffs, marshals, constables, deputies and other officers and their employes be and they are hereby enjoined jointly and severally and restrained from interfering with the possession of said Ancillary Receivers, and from removing, transferring or otherwise interfering with the property, assets and effects of the above named defendant, including the property, assets and effects held by, through or in the name of the said defendant, and be and they are hereby enjoined from interfering with the possession of said Ancillary Receivers and all other persons holding in their possession or under their control property, real estate personal or mixed belonging to the defendant, whether held by it or by or through or in the name of its agents, or any other company shall forthwith deliver possession to said Ancillary Receivers; **and said creditors and each of their attorneys, agents and employes are hereby jointly and severally restrained and enjoined from prosecuting, executing or suing out of any court any process, attachment replevin or other writ for the purpose of taking possession impounding or interfering with any assets or effects of the above named defendant** and from molesting or interfering with the Ancillary Receivers herein appointed in the discharge of their duties.

Security to be entered by the said Ancillary Receivers in the sum of $10,000.

All funds to be deposited in a designated depository.

By THE COURT:

/s/ WELSH, *J.*

3. Pennsylvania Act of July 1, 1937, P. L. 2547, 53 Purdon's Statutes, Sec. 2774:

Section 1. Be it enacted, &c., That hereafter any person, copartnership, association or corporation claiming damages from any county, city, borough, town, township, school district or other municipality, arising from the negligence of such municipality or any employe thereof, shall, within six (6) months from the date of origin of such claim or within six (6) months from the date of the negligence complained of, file in the office of the clerk or secretary of such municipality a notice in writing of such claim, stating briefly the facts upon which the claim is based. Such notice shall be signed by the person or persons claiming damages or their representatives. No cause of action may be validly entered of record where there was a failure to file such notice within the time required by this act, except leave of court to enter such action upon a showing of a reasonable excuse for such failure to file said notice shall first have been secured.

Section 2. This act shall become effective immediately upon its final enactment.

Section 3. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

IN THE

Supreme Court of the United States

October Term, 1940.

No. 350.

ALBERT M. LIEBERMAN, EMIL COHN, JR., and GEORGE F. McCANN, Ancillary Receivers of CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a Corporation,

Petitioners,

against

CITY OF PHILADELPHIA,

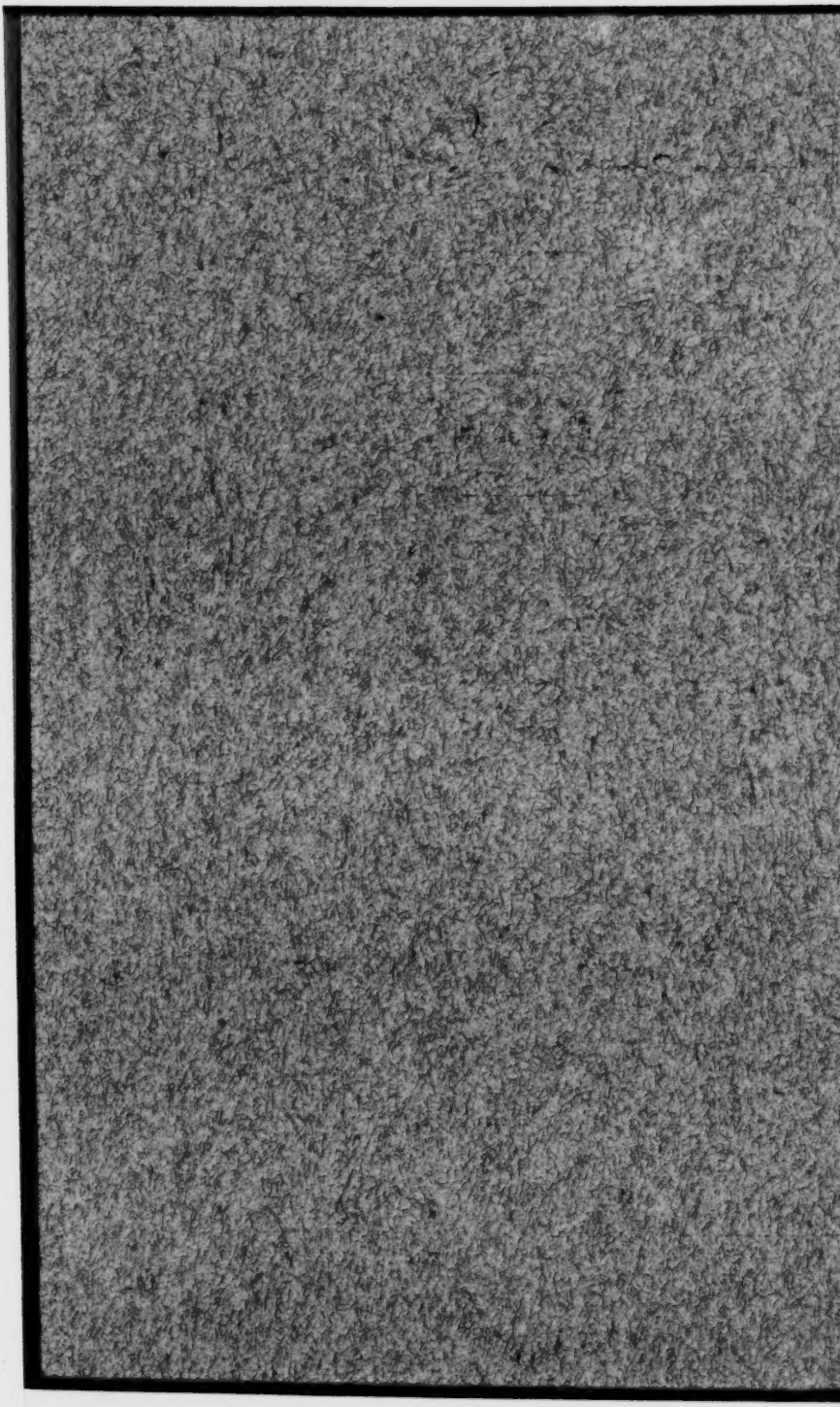
Respondent.

Petitioner's Brief Replying to Respondent's Brief Opposing Issuance of Writ of Certiorari.

DAVID SOFF,
GEORGE V. STRONG,
HIRSCHWALD, SOFF & REBIN,
STRONG, SAYLOR & FERGUSON,
Counsel for Petitioners.

1700 Girard Trust Co. Building,
Philadelphia, Penna.

International, 235 Chestnut St., Philadelphia



INDEX TO REPLY BRIEF.

CASES CITED IN REPLY BRIEF.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1940. No. 350.

ALBERT H. LIEBERMAN, EMIL COHN, JR., AND GEORGE F. McCANN, ANCILLARY RECEIVERS OF CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, A CORPORATION,

Petitioners,

against

CITY OF PHILADELPHIA,

Respondent.

PETITIONERS' BRIEF REPLYING TO RESPONDENT'S BRIEF OPPOSING ISSUANCE OF WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners believe that Respondent's brief merits this brief memorandum in reply.

I. JURISDICTION.

Petitioners contend that adequate grounds for the application for the issuance of a writ of certiorari are provided in this case by the clear conflict on identical facts between the decision of the Fifth Circuit in **National Surety Co. of N. Y. vs Cobb, 66 F. (2d) 323 (CCA 5 1933)** and that of the Third Circuit in the case at bar. The principle involved is that where a foreign corporation is dissolved at

the domicile, in the absence of a public policy to the contrary in states *other* than the domicile, no suit can be brought, nor personal judgment obtained, against the dissolved corporation in any other state where it may be licensed to do business.

In **Clark vs Williard, 292 U. S. 112, 78 L. Ed. 1160, 54 Sup. Ct. Rep. 615 (1934)**, the principle just mentioned underlay this Court's determination. This is clearly indicated in what was declared and done. Because there was no evidence of what the public policy of Montana might be in such cases, the action was sent back to Montana in order that the highest court of that state might speak on the subject. But this Court took pains to add that its conclusion was **not** at war with cases such as **National Surety Company vs Cobb, supra,** which decision this Court specifically mentioned.

Respondent quotes a line from the decision to the effect that the judgment obtained below in Montana "is at least effectual to liquidate the claim as a charge upon the local assets". Of course Justice Cardozo was speaking of a case begun against a foreign corporation *before dissolution* in states where the public policy might be to the contrary of that established in New York and Pennsylvania. He could not have referred to the prosecution of a suit in the face of a decree enjoining such action, such as a decree present at bar. Moreover, Petitioners have never contended that the securities which are the subject of this cause should be placed in the hands of the officers of the District Court otherwise than subject to the claims of Respondent under the contract, if any. Petitioners' whole case is predicated on the proposition that the Court's officers should have custody, subject to the agreement, **because Respondent cannot obtain a judgment.**

Respondent's efforts to obviate the effect of the decision of the Fifth Circuit in **National Surety Company vs Cobb, supra,** cannot be understood in the light of that Court's crystal-clear language.

The conclusion of the sentence quoted from that case, the commencement of which is copied on page 2 of Respondent's brief, is a statement of the principle for which Petitioners have cited the case. An effort is made by Respondent to cause this Court to believe that changes in the General Corporation Law of New York *since the decree of dissolution of the National Surety Company* would limit the decision of the Fifth Circuit in that case to other cases involving insurance companies dissolved *prior* to the amendment of 1932 to the New York General Corporation Law. But the Court in the case under discussion did not base its conclusion on the General Corporation Law but upon the Insurance Code, holding that the General Corporation Law did not apply to an insurance company, and this because Section 6 of the General Corporation Act provides that where in conflict with any other general corporation law, the General Corporation Law shall not apply.

Section 6 of the General Corporation Act of New York is still in effect. As recently as May 28, 1940 the Court of Appeals of the State of New York in **In Re National Surety Co., 27 N. E. (2d) 505** came to a conclusion identical to that reached by the Fifth Circuit in **National Surety Co. of N. Y. vs Cobb, supra.** The Court of Appeals case involved a surety company dissolved in New York in *1934.* The decision was that a judgment obtained after dissolution in Mississippi in an action against the statutory receiver of National Surety Company was void and of no effect because of the terms of the insurance law of New York relied on by

the Fifth Circuit Court in **National Surety Company of New York vs Cobb, supra.** It can hardly be argued now that the General Corporation Law of New York has any bearing upon the matter now under dispute.

It is also beyond argument that the law of Pennsylvania is similar **(Burns vs Niagara Life Insurance Co., 279 Pa. 453, 124 A. 128, 1924).** Consequently, there does not exist a "public policy" in Pennsylvania at war with the principle established in all the cases hereinabove cited. Because of such decisions, the jurisdictional element, a sharp conflict between the decisions of two circuit courts, is clearly present.

II. COMMENT ON SOME OF RESPONDENT'S STATEMENTS AS TO THE FACTS.

It is unfortunate that the facts in this matter should be the subject of any argument. However, as it is believed that they have not been correctly stated by Respondent, additional comments seem appropriate.

On page 3 of Respondent's brief reference is made to two proceedings instituted by Trevose Construction Company involving the parties now before this Court, one of which was instituted in Court of Common Pleas No. 3 of Philadelphia County as of June Term, 1932, No. 13,471. The other was instituted in Court of Common Pleas No. 4 of Philadelphia County as of December Term, 1935, No. 2064. Respondent states that in both cases judgments were entered against Petitioners and that Petitioners "permitted" such judgments. On page 9 of Respondent's brief it is again stated that proceedings were instituted and pursued to judgment "long after" the dissolution of Consolidated. These statements do not convey the correct impression.

The suit in Court of Common Pleas No. 3 was instituted by Trevose Construction Company long *before* dissolution, as the term of the proceedings indicates. It is true that a consent decree was entered with the permission of the District Court and of Petitioners in Court of Common Pleas No. 3 of Philadelphia County *after* dissolution of Consolidated in New York. It is not true, as the reference on page 9 of Respondent's brief might indicate, that this action was *instituted* after dissolution.

The statements relative to the proceedings in Court of Common Pleas No. 4 convey another erroneous impression. Petitioners were defendants in that action and vigorously opposed Trevose Construction Company in its effort to obtain a judgment. The judgment then obtained was appealed by Respondent, and then the matter was settled by the domiciliary receiver.

It is unfortunate that in its "Summary Statement of the Matter Involved" on page 5 and in its argument on page 10 Respondent mentions two suits which, at the time of the meetings before the Master, had been instituted against Respondent, which suits arose out of the contracts of contractors for whom Consolidated was surety. The impression is given by Respondent that these two suits are *still* pending and undetermined. On page 7 of the Petition for Writ of Certiorari, it is explained that one of these suits was discontinued October 21, 1938 and the other non-prossed by Respondent itself on January 29, 1940.

At the time of the argument before the District Court on Respondent's exceptions to the Master's Report, the District Court was handed an exemplification showing that of these two actions, one, the Siebner case, had been discontinued October 21, 1938. This exemplification was not

placed by the District Court in the record, nor did Respondent include it in printing the record for the Circuit Court. Nor has it ever introduced into these proceedings the undisputed fact that the other action—the Barag suit—was nonprossed by Respondent itself as recently as January 29, 1940.

Respondent also refers on page 5 to the Master's finding that the City of Philadelphia held outstanding obligations (not reduced to judgment) against Consolidated in the amount of $1839.11 representing money paid in repairing defective work performed under certain paving contracts on which Consolidated was surety. The City does not add the fact appearing on page 7 of the Petition for Writ of Certiorari that with the consent of Petitioners under order of the District Court this amount was long since paid to Respondent.

Lastly, Respondent on page 14 invites this Court's attention to a roofing contract (R. pp. 117-20), referred to also on R. p. 113 and R. p. 224, in an effort to cause this Court to infer that a fifteen year guarantee by the contractor bonded by Consolidated is still in effect. Petitioners have already pointed out in Footnote B on page 7 of their Petition for a Writ of Certiorari that this fifteen year guarantee was to be that of the manufacturer of the roofing material, not the contractor building the roof. Mention is made of this small item to avoid false impressions.

For the reasons set forth in the foregoing section of this Reply it is confidently reiterated that the question of whether there are now any "outstanding obligations" of Consolidated to Respondent is confined only to Respondent's claim that completion or performance contracts long since executed should be construed so as to include a term of permanent indemnity on the part of the contractor.

III. CONCLUSION.

Respondent's brief concludes with an *ad hominem* argument as to the City's vital interest in this case and the large amounts paid surety companies for premiums. A plea is also made for the sanctity of contracts. Petitioners choose to rest their argument upon the law, but it might well be said that surety companies and contractors the country over are also vitally interested in the outcome of this case. They are desirous of hearing from this Court whether contracts entered into as ordinary performance contracts are going to be construed as obligations for permanent indemnity. If the decision of the Circuit Court stands, thousands of contracts similar to that here involved will be given an interpretation novel in building law.

Respectfully submitted,

DAVID GOFF,
GEORGE V. STRONG,
HIRSCHWALD, GOFF & RUBIN,
STRONG, SAYLOR & FERGUSON,
Counsel for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1940.

No. 350

ALBERT H. LIEBERMAN, EMIL COHN, JR., and GEORGE F. McCANN, Ancillary Receivers of CONSOLIDATED INDEMNITY AND INSURANCE COMPANY, a Corporation,

Petitioners,

against

CITY OF PHILADELPHIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANCIS F. BURCH,
City Solicitor,

SAMUEL FELDMAN,
ABRAHAM WERNICK,
Assistant City Solicitors,
Counsel for Respondent.

7th Floor, City Hall Annex,
Philadelphia, Pa.

Martin & Lyle, 302 Penfield Bldg., Phila., Pen. 0665, Keystn. Race 6067.

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CASES CITED.

CASES CITED (Continued).

OTHER AUTHORITIES.

JURISDICTION.

The petitioners' theory that this Court has jurisdiction of the instant case is based upon their presumption that a conflict exists between the decision rendered in the instant case by the Third Circuit and that of this Court in **Clark v. Williard, 292 U. S. 112, 78 L. Ed. 1160, 54 Sup. Ct. Rep. 615 (1934)**, and of the Fifth Circuit in **National Surety Company of New York v. Cobb, 66 F. (2d) 323 (1933)**. If, therefore, upon analysis of those cases it be demonstrated that there is in fact no material variance in the principles of law enunciated in each of them the petition for a writ of certiorari filed herein will be found to be devoid of the requisite grounds for the assumption of jurisdiction by this Court and should therefore be dismissed.

The decision in **Clark v. Williard**, supra, does not sustain the contention advanced by the petitioners to the effect that after the dissolution of the Consolidated Indemnity and Insurance Company no relief can be obtained by the City of Philadelphia against the securities deposited by that company with the Broad Street Trust Company. Mr. Justice Cardozo in the course of the opinion in that case, said, (p. 120): "In such circumstances the judgment is at least effectual to liquidate the claim as a charge upon the local assets". That statement of law supports the respondent's contention that apart from the right to proceed *in personam* against the dissolved corporation, a creditor may nevertheless proceed *in rem* against any property of that corporation which had been deposited in the jurisdiction wherein the proceedings are instituted. And that is the principle which the Circuit Court of Appeals for the Third Circuit invoked in sustaining the respondent's contention in the instant case.

Section 2 of the General Corporation Laws of the State of New York discussed in the opinion of the Court

in **National Surety Company of N. Y. v. Cobb**, supra, (p. 34) provides that stock corporations shall be "(1) a money corporation". Section 3 of the same General Laws defines a money corporation in the following terms: "A money corporation is a corporation formed under and subject to the banking law or the *insurance* law". (Italics supplied)

Circuit Judge Hutcheson, after reviewing that language, said (p. 325):

> "Assuming that Section 29 does have the effect of continuing the life of corporations for purpose of suit, though this is questionable, * * *, for this statute, unlike that existing before 1929 and restored by the amendment of 1932, does not provide in terms that upon the dissolution of a corporation * * * its corporate existence shall continue for the purpose of paying existing obligations and it may sue and be sued in its corporate name * * *".

Since the decree of dissolution in the Cobb Case was entered in 1930, it obviously was controlled by the 1929 Act, which did not have the same provision regarding the continuance of the corporation for the purpose of suit as did the earlier Act prior to 1929, and which was restored by the amendment of 1932. *In view of the fact that the dissolution of the Consolidated Company occurred in May of 1934, it would necessarily be controlled by the amendment of 1932, the express purport of which is to continue the life of the corporation for the purpose of suit.*

The effect of the decision of the Third Circuit in the instant case is that the respondent will be required to apply to the District Court for leave to prosecute such actions against the securities deposited with the Broad Street Trust Company as may be necessary to protect its rights in the premises and that upon such application it would be the duty of the District Court to grant such

leave. Clearly that conclusion is in no wise in conflict with the decision of this Court in **Clark v. Williard,** or of the Fifth Circuit in **National Surety Company v. Cobb.**

Even though a corporation may not be sued *in personam,* after its dissolution, the law permits a proceeding *in rem* against the property of such corporation in a foreign jurisdiction in order to utilize such property in satisfaction of the obligation where the property was deposited for the specific purpose of paying such claims while the corporation was solvent: **14A C. J. p. 1351.**

It is rather significant that the petitioners permitted an equity proceeding to be instituted against them in the Court of Common Pleas No. 4 of Philadelphia County, as of December Term, 1935, No. 2064 and judgment to be entered against them therein on November 4, 1937 in favor of the TREVOSE CONSTRUCTION COMPANY. Reference to this case was made by the petitioners on page 14 of their brief filed in the Circuit Court of Appeals. On page 47 of the Record, reference is made to the judgment entered against the petitioners on October 4, 1935 in favor of the TREVOSE CONSTRUCTION COMPANY in the Court of Common Pleas No. 3 of Philadelphia County, as of June Term, 1932, No. 13471. Since the Consolidated Indemnity and Insurance Company was dissolved on May 24, 1934, it is difficult to understand why the petitioners permitted the entry of those judgments against them if their contention now made that no judgment can be entered against a dissolved corporation be sound.

Moreover, it is extremely doubtful whether the petitioners, who are ancillary receivers of the Consolidated Indemnity and Insurance Company, have the right to file a petition for a writ of certiorari without first having obtained leave so to do from the District Court: **53 C. J. p. 316; 3 C. J. p. 654.**

Hence respondent respectfully submits that the petition for a writ of certiorari in the instant case should be dismissed.

SUMMARY STATEMENT OF MATTER INVOLVED.

This case involves the rights of the City of Philadelphia under a certain agreement dated November 30, 1929 (R. pp. 11-15) between the Consolidated Indemnity and Insurance Company, a New York Corporation, the Broad Street Trust Company and the said City, and also under a second agreement dated June 14, 1934 entered into between the petitioners, the ancillary receivers of the Consolidated Indemnity and Insurance Company and the City of Philadelphia, the latter agreement having been approved by the United States District Court (R. pp. 17, 21-24, 35).

Under the first of said agreements the securities of the value of One Hundred Thousand Dollars ($100,000) deposited with the Broad Street Trust Company were not to be surrendered to the Consolidated Indemnity and Insurance Company until the City Solicitor of the City of Philadelphia would consent in writing to do so; and that official was not to give his consent until such time as the City of Philadelphia held no outstanding obligations of the Consolidated Company.

The petitioners were appointed ancillary receivers of the Consolidated Indemnity and Insurance Company by the District Court of the United States for the Eastern District of Pennsylvania on May 11, 1934. At that time the New York Courts had not yet decreed a dissolution of the Consolidated Indemnity and Insurance Company. Shortly after their appointment as ancillary receivers, to wit, on May 18, 1934 the petitioners filed in the District Court a petition for a rule to show cause why the Broad Street Trust Company should not be ordered to surrender to them the above named securities. To that petition the City filed preliminary objections challenging the right of the District Court to grant such relief (R. pp. 20, 44, 45). When the District Court indicated to the petitioners that in its opinion the position of the respondent was sound (R. pp. 44, 45), the petitioners took no further action with respect to those securities until November 17, 1937, when

the present equity proceedings were instituted. The petitioners sought through those proceedings to secure information regarding the outstanding obligations of the Consolidated Company so as to enable them to make proper adjustments thereof (R. p. 7), and in paragraph 13 of the Bill stated that the Broad Street Trust Company and the City of Philadelphia are holding in trust for the petitioners only so many of the securities as remain after the deduction of not presently matured obligations but also any contingent obligations which may hereafter be liquidated. The prayers of the Bill were that the City be ordered to file an accounting of all outstanding claims it may have against any principals for whom Consolidated was surety, *including contingent liabilities, and to return only such securities in excess of judgments already entered, and contingent liabilities.*

In his report the Special Master appointed to hear testimony found that the City of Philadelphia held no final judgment recovered in its favor against the Consolidated Company, and that no such final judgment could be recovered without special leave of Court (R. p. 199). He also found that the City of Philadelphia held outstanding obligations to the extent of $1,839.11, representing money expended in repairing defective work performed under certain contracts upon which the Consolidated Company was surety; and also in the sum of $7,007.05 being the total amount of damages claimed in two suits that were pending against the City, and as to which the Special Master said, "Should the suits be proceeded to trial and final judgment, the Consolidated Company as surety would be liable to the City" (R. p. 199).

The Special Master further held that all other of the outstanding obligations imputed to the Consolidated Company are non-existent and hypothetical and therefore recommended that an order be entered directing the Broad Street Trust Company to turn over to the ancillary receivers forthwith all the securities deposited with it on November 30, 1929.

The District Court dismissed the respondent's exceptions to the Master's report without filing an opinion. On appeal to the Circuit Court of Appeals for the Third Circuit the order of the lower Court was reversed. Some time thereafter on petition of the petitioners a re-argument was granted at which the petitioners and others as amici curiae were heard. Subsequently the Court filed a supplemental opinion affirming its former decision; both opinions are reported in **112 F. (2d) 424.**

ARGUMENT.

1. On page 13 of the petition a number of decisions are cited purporting to support the contention that in case of insolvency pledged property must be surrendered to the receiver of the pledgor where the holder or beneficiary of the pledged property is without the means, power or machinery for carrying out the terms or purposes of the pledge. In the briefs filed in the Circuit Court of Appeals the petitioners cited the same decisions in support of their contention then made, to the effect that the pledged property must be surrendered to the receiver of the pledgor where there is a dry trust.

The respondent in response to the latter contention established the fact that the trust in the instant case is not a dry but an active one. An examination of paragraph 4 of the agreement of November 30, 1929 aforesaid under which the securities were deposited discloses a provision to the effect that all interest and dividends accruing from the securities shall be paid to the Consolidated Company. That clearly involves active duties of collecting interest, maintaining records therefor and paying same to the parties entitled thereto. And paragraph 6 of that agreement provides that if a judgment against the Consolidated Company in favor of the City be not paid after sixty days' notice, the Broad Street Trust Company shall sell and

transfer so many of the securities as may be required to pay said judgment, with costs and interest; that provision also imposes active duties: **Barnett's Appeal, 46 Pa. St. 392, 399; Dodson v. Ball, 60 Pa. St. 492, 496; Hemphill's Estate, 180 Pa. St. 95, 36 Atl. 409; Simmonin's Estate, 260 Pa. St. 395, 397, 103 Atl. 927; Bierne v. Cont. Eq. T. & Tr. Co., 307 Pa. St. 570, 576, 161 Atl. 721.**

With further reference to the citations appearing on page 13 of the petition, it is respectfully submitted that one group thereof involved a situation where a state statute providing for the deposit of securities with a state officer for the protection of policy holders, contains a specific provision that when a receiver is appointed at the instance of policy holders the state officer shall turn over to such receiver the securities so held by him. Typical of that group is **Morrill v. American Reserve Bond Company, 151 F. 305 (C. C. W. D. Missouri, 1907).** In that case a statute of Missouri provided that when a receiver is appointed the state treasurer shall be required to surrender the securities to such receiver upon order of the Court.

A similar situation existed in **Hobbs v. Occidental Life Insurance Company, 87 F. (2d) 380 (C. C. A. 10, 1937),** wherein the decision was based on a specific wording of the Kansas statute.

A second group of those citations involved a situation *where the application for the appointment of a receiver was made by the policy holders for whose specific benefit the securities had been deposited with the state officer,* and when an effort was made to have the state officer surrender the securities to the receiver, the only objection thereto was made by such state officer. The Court in those cases held that since the receiver represents the policy holders and the fund was deposited specifically for their benefit the state officer was in no position to object to their surrender since he represented no pecuniary interest therein. Typical of this group of cases is **Holloway v. Federal Reserve Life Insurance Company, 21 F. Supp. 516 (D. C. W. D. Missouri, 1937).**

In the instant case the securities were deposited with the Broad Street Trust Company for the specific benefit of the City of Philadelphia, the respondent herein. The application for the appointment of the ancillary receivers was not made by or at the instance of the said City but at the instance of parties and persons who can have no interest in those securities until after the respondent has been fully safeguarded and indemnified from the proceeds thereof. *Moreover, it is the beneficiary of those securities, i. e., the City of Philadelphia, which is opposing their surrender to the ancillary receivers rather than requesting or advocating such action; whereas in the cases cited by the petitioners referred to, the only party opposing the surrender of the securities was the stakeholder, namely, the state officer, who admittedly had no interest whatever therein.*

A third group from the cases cited by the petitioners involved a situation where the state treasurer had surrendered to the receiver the securities deposited with him by the insolvent company, and a third party had intervened and opposed such surrender. In those cases the Court expressly held that such third party was in no position to complain. Typical of this group is **Hopkins v. Lancaster, 254 F. 190, 192 (D. C. N. D. Ala. 1918).**

Thus it is manifest that: (a) the citations appearing on page 13 of the petition filed herein do not sustain the contention made that pledged property must be surrendered to a receiver of the pledgor where a pledge holder has not the means, power or machinery of carrying out the terms or purposes of the pledge; and (b) the facts of those cases are not similar to, but on the contrary are clearly distinguishable from those of the instant case.

2. Petitioners contend that there is a conflict between the decision of the Third Circuit in the instant case and the decision of this Court in **Clark v. Williard**, supra, as well as the decision of the Fifth Circuit in the case of **National Surety Company of N. Y. v. Cobb**, supra. This

contention has already been answered by the respondent under the title "JURISDICTION", of this opposing brief.

On page 15 of the petition there is cited **Burns v. Niagara Life Insurance Company, 279 Pa. St. 453, 124 Atl. 128 (1924).** We submit that in that case the Supreme Court of Pennsylvania merely adopted the law of New York, that such corporation could not be sued *in personam* after its dissolution for the purpose of having judgment entered against it in Pennsylvania. The question involved in the instant case, however, is whether proceedings *in rem* may be instituted by the respondent for the purpose of proceeding against the securities deposited with the Broad Street Trust Company in this jurisdiction, in order to utilize the securities in satisfaction of obligations due to the respondent.

3. Petitioners complain that the Circuit Court of Appeals in this case held that upon proper application by the respondent the District Court could grant respondent leave to proceed against these securities in an appropriate tribunal. Such procedure is legal and proper as **Meehan v. Connell Anthracite Mining Company, 318 Pa. St. 481, 178 Atl. 833 (1935)** cited by the Circuit Court clearly establishes. Moreover, it is to be noted that proceedings were instituted and pursued to judgment against the Consolidated Company both in the Court of Common Pleas No. 3 and in the Court of Common Pleas No. 4 of Philadelphia County, long after the dissolution of the Consolidated Company by the State of New York as was more fully related hereinabove.

4. Petitioners complain that the Circuit Court of Appeals in holding that there are outstanding obligations of the Consolidated Company, introduced a "startling innovation into the law of building contracts and commercial surety, one not directly supported by any previous authority". It is to be noted that the petitioners for the first time in these proceedings advanced the contention in the

Circuit Court of Appeals that there were no outstanding obligations of the Consolidated Company in favor of the City, for the reason that the City would have no right to sue that company because of any judgments entered against the City arising out of damages which occurred after the work was finished by the contractor. In their petition to this Court they now repeat the same contention. An examination of the report of the Special Master filed herein fails to disclose the fact that he had made any reference whatsoever to such contention, and moreover made a finding against the basis for such contention. On page 199 of the Record the Special Master refers to two suits which had been instituted against the City for damages totaling $7,007.05, and said:

> "Should the suits be proceeded with to trial and final judgment, the Consolidated Company, as surety, would be liable to the City."

This is a specific finding that the City could hold the Consolidated Company responsible for both cases. One of those cases, (R. p. 123), was that of **Albert S. Siebner v. City of Phila. and Henry W. Horst Co., Additional Defendant,** instituted in the Municipal Court, as of August 1936, No. 334 for $1,007.03. An examination of the pleadings in that case discloses that suit was instituted on August 11, 1936 and damages claimed because on April 3, 1936 the plaintiff had been compelled to excavate and rip out the improperly installed drain pipe, and to install a new drain pipe in its place at a cost of $1,007.03. The statement of claim further averred that from April 15, 1932, and thereafter, water and sewage which should have been discharged through the drain pipe into the sewage pipe, backed up into the property of the plaintiff. The writ of Sci. Fa. filed by the City to join in the contractor, Henry W. Horst Co., as additional defendant, averred that the work in constructing the Locust Street Subway by said contractor which caused this condition, was com-

pleted on December 17, 1931 and the answer of the contractor admits it.

Here then, is a case where the damages occurred long after the work had been completed and accepted by the City of Philadelphia, and the Special Master found that the Consolidated Company would be responsible to the City for any judgment entered against it for damage arising from said work. This certainly militates against the contention of the petitioners raised for the first time in the Circuit Court of Appeals that the indemnity clause in the various contracts upon which the Consolidated Company was surety must be limited to cover only damages that occur before the work of the contractor is finished. To adopt such a contention would result in eliminating entirely the express provisions of that portion of the indemnity clause quoted in the opinion of Judge Maris. It is manifest that some meaning and effect must be given to the word "further", appearing in the second portion of the indemnity clause, as well as to the words "during the progress of the work", which limits the words "prosecution of the work" contained in the second portion of the indemnity clause, but not in the first portion.

The City does not agree with the argument of the petitioners that the contractor does not remain responsible to the City after the work is accepted. On the contrary, it is contended that the law is otherwise, for in the very cases cited by the petitioners it was held that even though the contractor may not be sued by the injured third party after the work is accepted by the City, nevertheless the City may sue the contractor. Thus in **Presbyterian Congregation v. Smith, 163 Pa. St. 561, 577, 30 Atl. 279**, the Court said:

> ". . . *Now, the contractor may be liable on his contract to the city for his negligence,* but he is not liable to the traveller; . . . because, between the traveller and the contractor intervened the City, an indepen-

dent responsible agent, breaking the causal connection". (Italics suplied)

In **Cunningham v. Gillespie, 241 Mass. 280, 135 N. E. 105**, the Court said:

". . . The defendant, of course, remained bound to the Boston Transit Commission according to the terms of his contract".

Likewise in the case of **Ford v. Sturgis, 14 F. (2d) 253, 254**, the rule is stated as follows:

". . . The liability of the builder or contractor for defective construction is to the person with whom he was under contractual relations, and a stranger can hold him liable after he has parted with possession only under exceptional circumstances. . . . 65 L. R. A. 620".

There have been cases where it was held that even though the City supervised the work, the contractor would be responsible to the injured third party: **Erie v. Caulkins, 85 Pa. St. 247, 27 Atl. 642**, cited with approval in **Baier et ux v. Glen Alden Coal Co., 131 Pa. Super. Court 309, 320, 200 Atl. 190.**

Again there are cases where the City has been held responsible, typical of which is **Harvey v. Chester, 211 Pa. St. 563, 61 Atl. 118**, although it was recognized that the contractor also remained responsible if the contractor was negligent where he was under duty to keep the subject of the contract in proper repair for any length of time subsequent to the completion of the work.

Hence, while it has been held that under certain circumstances the contractor is not responsible to an injured third party after the work has been accepted, even though there are authorities to the contrary, nevertheless the principle of law that the contractor is still responsible to the

owner or the municipality for whom the work was done for any damage caused by reason of the negligent manner in which the work was performed, is universally recognized.

It is to be noted that those cases do not concern themselves with situations similar to those prevailing herein, in that the contracts do not include a provision which is expressly contained in those involved in the instant case, to the effect that the contractor shall indemnify and save harmless the owner or municipality from any damage or loss that may be sustained by reason of the work performed by the contractor.

Respondent respectfully urges that the supervision of the work by its engineer may render the City responsible to a third party for any negligent work done by the contractor jointly with the contractor, on the theory that the failure of the City's engineer to properly supervise the work concurs with the negligent manner in which the contractor did the work which resulted in damage to the third party: **14 R. C. L. 84.**

Applying that principle to a state of facts as in the instant case it would make no difference whether the defects in construction were *latent* or *patent*, for where injury occurs by reason of the negligent manner in which the work was done by the contractor, even though the defects may be latent and were not discovered by the City engineer by reason of any omission or commission on his part, then both the City and contractor would be jointly responsible.

In fact that principle of law receives support from the English Case cited by the petitioners on p. 17 of their petition, namely, **Ilford Gas Co. v. Ilford Urban District Council and Jackson, 3rd party, LXVII, the Justice of the Peace, p. 365 (Court of Appeals, 1903).** There the jury found that the injury complained of was due to the *nature* of the work of the contractor and was not due to the *mode* in which the work was executed. Law Judge Sterling said

that since the jury found that the contractor in all respects properly performed his work and since the accident to the pipe of the plaintiff gas company occurred not from any improper acts of the contractor but only by reason of the nature of the work, and since the indemnity clause gives the District Council only a right to be indemnified against damage or injury arising or occasioned by the negligence, default or misconduct of the contractor, from or by the execution of the work, therefore, the District Council had no right to call upon the contractor for indemnity. *But nowhere in that case was it decided that the only time that the District Council may call on the contractor for indemnity is where the damage occurs during the progress of the work.*

The fact that although similar indemnity provisions have been included in the City's contracts for many years, and no contractor or indemnity company has ever argued that the City can only be indemnified for damage occurring during the progress of the work, is the most persuasive proof that no such construction or interpretation was ever intended.

The Court's attention might also be invited to a certain contract dated October 26, 1931 for roofing at the 11th District Police Station, which contract included a fifteen year guarantee (R. p. 113), and, while up to the present time, no claim has been made thereon, nevertheless under the term "outstanding obligation", that guarantee would manifestly be included.

Petitioners' argument that the indemnity clauses contained in the building contracts between the contractors and the City do not make the contractors liable for the City's own negligence is neither disputed nor involved in the present controversy, as the City does not contend that the contractors would be responsible for any damages caused by reason of the City's *sole* negligence. We do, however, submit that since the City may be held responsible for any damage caused by reason of the negligence of the contractors, under indemnity clauses contained in the City contracts, it has a right to seek indemnification

from the securities deposited with the Broad Street Trust Company.

Petitioners cite the case of **Flynn v. Philadelphia, 199 Pa. St. 476, 49 Atl. 249.** An examination of that case will disclose the fact that while the City in defending a suit by the contractor for the balance of the contract price asserted the right to withhold portions thereof, until certain claims against the City would be disposed of, the referee in that case found as a fact that although the damage arose as a result of the work done by the contractors, it was not by reason of any negligence on the part of the contractors in the performance of the work. For that reason it was held that the contractors could not be liable for injuries to the adjoining properties in the absence of proof of their failure to exercise proper care and skill in the prosecution of their work within the lines of the right of way which occasioned the damages which the City would otherwise have not been required to pay.

It may be of interest to observe that the brief of the appellee in the Flynn case (page 5), admits that *if the contractor were negligent in improperly doing the work that it might render the City liable even though the contractor was independent, and in such case the City would have a right to retain the money due him.*

It should further be noted that the indemnity provisions of the contracts involved in the instant case are much broader and entirely different from the indemnity provision of the contract involved in the Flynn case.

The other two cases of **Morton v. Traction Co., 20 Pa. Superior Court 325, and Perry v. Payne, 217 Pa. St. 252, 66 Atl. 553,** do not involve contracts with municipalities, nor indemnity provisions of the same nature and character as those in the instant case, and hence can be of no aid in the determination of the questions involved in the instant case.

The petitioners' contention that since a third party cannot hold the contractor responsible after the accept-

ance of the work, neither can the City hold the contracto responsible under the indemnity clause, is entirely witho merit. In the case of **Erie v. Caulkins**, supra, the contra provided that the contractor was acting independentl and that the work should be done under the supervisio of the City engineer. Mr. Justice Gordon in the cour of the opinion said (pp. 253, 254):

> ". . . This contract contemplates the accomplis ment of a certain result; the means, so far as th are deemed necessary to give the work its prop character, are carefully specified; the province of t engineer was to see that these means were proper applied, in other words, to see that proper materia and methods were used to produce the required resu But in all this the contractor was supreme, for he h but to comply with his contract in delivering to t city a good job according to the terms of that co tract. In doing this he was his own master; the ci could not direct where he should get his materi how he should bring it upon the ground or how ma men he should employ. The city could not fill up t trenches which he dug in the ground designated f the sewer, neither could it erect barricades which might not tear down if they obstructed his work; was in the lawful possession of that part of the str which was necessary for the fulfillment of his und taking, and the city could not dispossess him. think, therefore, the principle of master and serva is not to be discovered in the contract between th parties, and that the defendant is not within the r stated by Mr. Justice Agnew, in Allen v. Willard, P. F. Smith 374, that the liability of the employer the contractor continues where he has not relinquish his control over the work to be done.
>
> "Again, it is scarcely open to question, but t Grant himself was responsible for the negligence

those whom he employed about this work. He could not plead that he was but an agent, and that as such he employed the workmen, for in this matter, at least, the city could not control him. These were his own servants who must look to him for their pay and direction; they had no claims against the city and could hold it responsible for nothing; even were they negligent and unskillful they could bid the city defiance until Grant chose to discharge them. If so, then, beyond controversy, Grant was, to these employees, the responsible superior and there could be no other. As was said in Wray v. Evans, there cannot be two superiors severally liable for the acts of subordinate agents. This case, therefore, necessarily drops into that class of cases represented by Painter v. The Mayor, 10 Wright 213; Hunt v. The Pennsylvania Railroad Co., 1 P. F. Smith, 475; Allen v. Willard, 7 Id. 374; and Reed v. The City, 29 Id. 300. In several of these cases this whole subject has been very carefully elaborated, and we need not, therefore, undertake to re-discuss the matter".

Petitioners argue that for any jeopardy respondent might have as a result of accidents occurring *during* construction, the **Penna. Act of July 1, 1937, P. L. 2547, 53 P. S. Sec. 2774**, would seem to afford respondent adequate protection.

The Circuit Court of Appeals conclusively answered that contention, holding that the date of origin of such claim necessarily means the date when the injury or damage is caused, and the six months provided in that statute would run from that date: **(112 Fed. (2d) 428)**.

We respectfully submit that the basic question involved in this case and one of vital import to the City of Philadelphia, is whether a contract entered into with a solvent corporation may subsequently be repudiated by ancillary receivers appointed upon the insolvency of that

corporation, even though that agreement (as in the instant case) has been expressly ratified and re-affirmed by a subsequent agreement executed by those very ancillary receivers. The inevitable answer is that such an agreement is just as sacred against attack by ancillary receivers as it is by the original contracting parties themselves or by the State wherein the contract was made since it has been universally established that receivers always take the assets *cum onere:*

Clark on Receivers, 2nd Ed., Vol. 1, p. 942;
Ruggles v. Chapman, 1 Hun. 324, 8 Supreme Ct. Reports N. Y. 324;
Ruggles v. Chapman, 14 Sickels 626, 59 N. Y. 164;
Ruggles v. Chapman, 64 N. Y. 557;
In Re Home Provident S. F. Ass'n., 129 N. Y. 288, 29 N. E. 323;
Risk v. Kansas Trust and Banking Co., 58 Fed. 45;
Vandiver v. Poe, 119 Md. 348, 87 Atl. 410;
Brackett v. Middlesex Banking Co., 89 Conn. 645, 95 Atl. 12;
Austin-Nichols & Co. v. Union Trust Co., 289 Pa. St. 341, 137 Atl. 461;
Wyoming Construction Co. v. Franklin Trust Co., 298 Pa. St. 582, 148 Atl. 902;
Greenbaum v. Hotel Co., 38 Fed. (2d) 96 (W. D. Pa.);
Galey v. Guffey, 248 Pa. St. 523, 94 Atl. 238;
Mortgage Bldg. and Loan Case, 334 Pa. St. 81, 5 Atl. (2d) 342;
Philadelphia Trust Company v. Northumberland County Traction Co., 258 Pa. St. 152, 172, 101 Atl. 970;
Bunn v. Gorgas, 41 Pa. St. 441;
Penrose v. Erie Canal Co., 56 Pa. St. 46;
Breitenbach v. Bush, 44 Pa. St. 313;
Billmeyer v. Evans, et al., 40 Pa. St. 324;
Weist v. Wuller, 210 Pa. St. 143, 59 Atl. 820;

The Columbia & Montour Electric Company v. The North Branch Transit Company, 258 Pa. St. 447, 102 Atl. 214;
Hunt v. Thomas, 3 Phila. 121;
Beaver Co. B. & L. Assn. v. Winowich, 323 Pa. St. 483; 187 Atl. 481.

It is a fundamental principle of law that the rights of a receiver cannot rise higher than those of the debtor of a judgment creditor.

Deere Plow Co. v. Hershey, 287 Pa. St. 92, 134 Atl. 490;
Blum Bros. v. Burk, 248 Pa. St. 148, 93 Atl. 940;
Frowert v. Blank, 205 Pa. St. 299, 54 Atl. 1000;
Risk v. Kansas Trust & Banking Co., 58 Fed. Rep. 45;
Greenbaum v. General Forbes Hotel Co., 38 Fed. Rep. (2d) 96 (W. D. Pa.);
Fidelity Insurance Trust & Safe Deposit Co. v. Roanoke Iron Co., 81 Fed. Rep. 439.

Where a pledge is made in good faith the pledgee is entitled to the possession of the pledged property as against the receiver of the pledgor and to enforce his security in accordance with the contract under which he holds.

Sturzinger v. Hart, 22 Fed. (2d) 801;
In Re Binghampton Gen. Elec. Co., 143 N. Y. 261;
Rogers Brown & Co. v. Tendel Morris Co., 271 Fed. 475 (D. C. E. D. Pa.);
In Re Dissolution of Home Provident S. F. Ass'n., 129 N. Y. 288, 29 N. E. Rep. 323;
High on Receivers, Sect. 359.

The dissolution or insolvency of the company and the appointment of a receiver do not affect a guaranty fund or a trust fund created by the company for the protection

of policyholders, and the court has no power to order the trustees to pay over the trust fund to the receiver, unless the trust agreement authorizes it: **32 C. J. p. 1050.**

Since the contracts of November 30, 1929 and June 14, 1934 hereinabove referred to provide that the securities should not be returned unless the City Solicitor gives his written consent, and that such consent shall not be given as long as there are outstanding obligations of the Consolidated Company, it is respectfully submitted that the petitioners could not disturb that trust agreement any more than could the Consolidated Company itself, for the obvious reason that the City Solicitor has not given his written consent, and because he would have no authority to give such consent in view of the fact that there are outstanding obligations of the Consolidated Company. And indeed, before the Special Master, the attorneys for the petitioners admitted that if there were outstanding obligations they are not entitled to relief (R. p. 46).

Moreover, the term "outstanding obligations" was interpreted by the attorneys for the petitioners before the Special Master as follows, (R. p. 63):

> "MR. ROSEN: Well, I understand by outstanding obligations any contract or bond that this surety Company gave to the City of Philadelphia in connection with work, furnishing of materials, etc. which has not expired by reason of the statute of limitations".

The term "outstanding obligation" has been construed to be an obligation that is "unsettled", "uncollected", or otherwise "undetermined", as for instance, an outstanding contract.

> **New York Trust Co. v. Portland Railway Company, 197 N. Y. Appellate Div. 422, 428 (1921).**

The Special Master, without the citation of any auth-

orities, refers to the outstanding obligations as "non-existent and hypothetical" (R. p. 199); but it is respectfully submitted that the possibilities and probabilities of suits being instituted against the City of Philadelphia are real and actual. The record discloses (R. p. 165) that the outstanding surety bonds of the Consolidated Indemnity and Insurance Company, upon which claims for property damages may still be made against the City of Philadelphia, aggregate in amount Two Hundred and Nine Thousand Dollars, ($209,000), where the Consolidated Indemnity and Insurance Company was sole surety; and Five Million One Hundred Two Thousand Five Hundred Dollars, ($5,102,500) where the Consolidated Company was co-surety.

It does not lie in the mouths of the petitioners to say that the work performed by a contractor, the Keystone State Corporation, for instance, in the construction of the City Hall Concourse, known as Step No. 2 (R. p. 165), may not by reason of some negligent construction or defective material cause property damage to various parties or persons by the settling, cracking, and even collapse of buildings, walls or other structures, the result of which would involve damages aggregating in amount many times the value of the securities deposited by the Consolidated Company and its co-sureties on such contract, as well as the aggregate amounts of principal of the surety bonds given to the City of Philadelphia in connection with such contract.

The City is vitally interested in knowing whether it receives proper protection, when in pursuance to the provisions of an ordinance it requires foreign corporations, before permitting them to act as sureties on municipal contracts, to deposit One Hundred Thousand Dollars ($100,000) worth of securities, which shall be utilized only for its benefit. *The purpose of depositing such security is to safeguard against the very contingency which has occurred in this case, namely, the insolvency of the surety.* Furthermore, the agreement of deposit provides that the se-

curity shall not be surrendered unless other securities of equal or greater value are substituted and delivered to the Broad Street Trust Company by the Consolidated Company. If the contention of the petitioners should be sustained, it would mean that the City receives no protection whatever from its agreement against the insolvency of a foreign surety.

The Consolidated Company received substantial premiums for the execution and delivery of its various bonds, the amount of said premiums being reflected in the bids submitted by the contractors to the City and ultimately paid by the City as part of the contract price; and manifestly one of the reasons for the payment of those premiums was that the obligations imposed upon the Consolidated Company shall remain in force and effect until the City shall be relieved from any hazard of suit and actions at law.

We submit that the effect of the decision of the Circuit Court of Appeals is to uphold the sanctity and validity of the agreements of November 30, 1929 and June 14, 1934 and to give to the City the protection which the agreement was intended to afford it. Hence it is respectfully urged that said decision should not be disturbed and the petition for certiorari be dismissed.

Respectfully submitted,

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